

# Stop Making Sense: Advance Directives in Michigan

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# Ten Most Important Points

1. There are advantages and no disadvantages to having one or more advance directives.
2. There are five types of advance directive.
3. An individual cannot be forced to sign an advance directives.
4. Nursing homes play a critical role in regard to advance directives.

# Ten Most Important Points

5. Under a durable power of attorney for health care, a patient advocate has no authority to make medical care decisions until the document is “triggered.”
6. An individual can only have one patient advocate serving at one time
7. An individual always maintains the right to revoke an advance directive
8. Guardianship is no good

# Ten Most Important Points

9. If an individual had both a patient advocate and a guardian, it is the patient advocate, not the guardian, who has authority to make medical treatment and personal care decisions.
10. If a patient advocate or a guardian is exceeding her or his authority, or if a resident wishes to revoke a durable power of attorney or modify or terminate a guardianship, the State Long Term Care Ombudsman Program is an excellent resource to advocate for the resident.

# Resources

1. Changes and Choices, an understandable rendition of applicable Michigan law written for nursing home administrators, social workers and other staff.
2. Alternatives to Contemporaneous Decision-Making, a chart showing health care and financial documents.
3. Advance Directives: Planning for Medical Care in the Event of Loss of Decision-Making, has questions-and-answers and model forms for a durable power of attorney for health care, living will, do-not-resuscitate order and organ donation.
4. Advance Directives for Mental Health Care has question-and-answers and a model form

# More Resources

5. In Plain Sight: Variance in Practice in Michigan Probate Courts sets out the 70 ways probate courts and judges differ from one another in guardianship procedures.
6. Handbook for Guardians of Adults discusses the many duties of a guardian owed to the individual and to the court.
7. Survey of Practices of Practices of Professional Guardians which staff and surveyors can complete
8. Compendium of State Long Term Care Ombudsman Program Fact Sheets

# Advance Directives are Voluntary

- The decision to sign an advance directive is voluntary.
- This point is crystal clear in both federal law and state law.
- A nursing home cannot force an individual to have or not to have an advance directive as a condition of admission or continued care.
- A nursing home should never be cited merely because every resident doesn't have an advance directive or a guardian.

# Hurdles to having an advance directive

- Though there is speculation that relatively few individuals have one or more advance directives, no one can provide even an educated guess.
- There are at least four significant hurdles to a resident having an advance directive:
  - lack of knowledge about the right to have an advance directive
  - lack of information about how to obtain and complete an advance directive
  - resistance to thinking about the possibility of losing the ability to participate in medical treatment decisions
  - Fear of “locking in” her or his wishes



# Revocation of an advance directive

- An individual ALWAYS has the right to revoke an advance directive
  - Regardless of the type of advance directive
  - Regardless of who signed the advance directive: the individual, a patient advocate or a guardian
  - Regardless of the mental status of the individual

# Methods of Revocation

- An individual can revoke an advance directive by any means she or he can communicate an intent to revoke it; it does not have to be in writing
- Nursing home staff who witness a revocation have a responsibility to reduce it to writing and make the revocation part of the resident's medical record.

# Role of Nursing Homes: Education

- Nursing homes play a critical role in educating and assisting residents concerning advance directives.
- Under federal law, the Patient Self-Determination Act, a nursing home has a responsibility to inform incoming residents of their rights to control their own medical treatment and to sign an advance directive.
- If an incoming resident already has an advance directive, the nursing home must make it part of the resident's medical record.

# Role of Nursing Homes: Assistance

- The State Operations Manual states nursing homes must “offer assistance if the resident wishes to execute one or more advance directives.” Appendix PP, F578, CMS Transmittal 173, November 22, 2017.
- A nursing home’s responsibilities include, “Identifying, clarifying, and periodically reviewing, as part of the comprehensive care planning process, the existing care instructions and whether the resident wishes to change or continue these instructions.” *Ibid*.
- If a resident has one or more advance directives that don’t comport with the resident’s present wishes, the nursing home should inform the resident that she or he has the right to revoke any advance directive.
- A nursing home should inform a resident of sound mind that she or he has the right to sign a new advance directive.

# Types of Advance Directive

- There are 5 types of advance directive
  - Durable power of attorney for health care
  - Durable power of attorney for mental health care
  - Living Will
  - Do-not-resuscitate order
  - Physician's order regarding scope of treatment

# Durable Power of Attorney For Health Care

- A durable power of attorney for health care is also known as a “health care proxy” a “patient advocate designation” and a “medical power of attorney.”
- The concept of a durable power of attorney for health care is for an individual to appoint another person to make health care decisions for the individual if the individual becomes unable to participate in these decisions in the future.
- An individual can choose to include her or her general or specific wishes in the document.

# Who Can Have an Advance Directive?

- In order to sign an advance directive, an individual must be of “sound mind.”
- “Sound mind” is not defined in statute
- In the context of advance directives, sound mind requires an individual understands she or he is appointing another person to make medical treatment decisions if she or he loses the ability to make those decisions.
- There is no diagnosis, such as “dementia,” “traumatic brain injury,” “stroke” or “mental illness,” that automatically disqualifies an individual from being able to sign a durable power of attorney for health care.

# Requirements

- The requirements of a durable power of attorney are –
  - In writing
  - Individual indicates her or his choice to serve as patient advocate
  - Document is signed
  - Document is witnessed by two disinterested persons
  - Patient advocate signs the Acceptance (then or later)
- There is no time limit on how long a durable power of attorney document remains effective.



# Forms

- There is no standard form or format for a durable power of attorney for health care.
- An individual can chose to use any form or have a lawyer draft a document.
- A nursing home cannot require an individual to choose a form developed by the nursing home.
- An excellent form is in the booklet, Advanced Directives: Planning for Medical Care in the Event of Loss of Decision-Making Ability.

# Found in Translation

- Through a project jointly undertaken by the Michigan State Long Term Care Program, under the direction of Sarah Slocum, and the Elder Law & Advocacy Program, under the direction of Katy Graham, this booklet is available in 7 languages.
  - English
  - Spanish (translation courtesy of the Hispanic Bar Association)
  - Arabic (translation by Faiza Najar, Local LTC Ombudsman)
  - Korean
  - Italian
  - German
  - Bosnian / Croatian

# Communication Difficulties

- In providing information to residents on their rights concerning medical treatment, and in assisting residents to exercise their right to have an advance directive, nursing home staff must be sensitive to -
  - Hearing loss
  - Restricted vision
  - Limited literacy

# Patient Advocate

- An individual can appoint just one patient advocate to serve at one time.
- Unfortunately, some lawyers draft documents in which there are more than one patient advocate serving at one time.
- It is a good idea for an individual to appoint a “successor patient advocate” to serve if the first-named person becomes unable to serve or cannot be located.
- An individual can choose any adult who is willing to serve.

# Expressing Wishes

- An individual can choose to express her or her wishes for care in the document.
- If the individual chooses to express her or his wishes, they can be as simple or as detailed as the individual wants.
- There is no inherent bias in the concept of a durable power of attorney toward less care rather than more care.

# Scope of authority

- An individual can grant a patient advocate authority to make any decision the individual could make for herself or himself.
- An individual can limit the authority of a patient advocate in any way the individual sees fit.
- If an individual wants to give a patient advocate authority to withhold or withdraw life sustaining treatment, the individual must indicate so explicitly in the document.
- An individual can give a patient advocate authority to withhold or withdraw artificially administered nutrition and hydration.
- Nursing home staff must read each durable power of attorney for health care to determine the breadth of the authority of the patient advocate.
- The decision of a patient advocate concerning health and personal care trumps a guardian.

# Signing/ Witnessing the Document

- A durable power of attorney must be -
  - signed by the individual (or if the individual is physically incapable of signing, by a person at the direction of the individual)
  - dated
  - witnessed by two disinterested adults
- A number of people are disqualified as witnesses, including family members and physician.
- An employee of a nursing home cannot be a witness for a resident.
- A durable power of attorney for health care (or any other type advance directive) does not need to be notarized; notarization does not strengthen the document.

# Acceptance

- Before having authority to act for an individual, a patient advocate must sign an “Acceptance.”
- The content of the Acceptance must be quite similar to the language set forth in statute.
- The Acceptance can be signed at the time the individual signs the document or any time prior to making decisions.
- A successor patient advocate must sign an Acceptance before she or he can act.



# Authority to Act

- A patient advocate under a durable power of attorney has no authority to make health care decisions until the document is “triggered,” also referred to as “activated.”
- The document is triggered when the attending physician and one other physician or psychologist, after examining the individual, determine the the individual is “unable to participate in medical treatment decisions.”

# Duty of Patient Advocate and Physician

- In performing her or his role, a patient advocate is required to take reasonable steps to follow the wishes of the individual.
- Those wishes may be written in the document or expressed orally in the past or currently.
- A patient advocate can sign an admissions agreement, but has no financial liability unless she or he otherwise controls funds.
- A patient advocate cannot interfere with the community transition process and cannot prohibit a resident from leaving the facility (as the resident can revoke the document).
- The duty and authority of patient advocate are not affected merely because other family members disagree with a decision.
- Physicians are generally bound by decisions of patient advocate to the same degree as though resident were making the decision.

# Right to Have Visitors

- Nursing home must inform residents of their right to have visitors
- A patient advocate does not have authority to restrict visitors to a resident.
  - The right of nursing home residents to have visitors is set forth in federal law. 42 CFR 483.10(f)
  - Individuals have no intention to give their patient advocates this authority
  - Individuals can revoke the document if their patient advocate tries to interfere with this right

# Suspension and Revocation

- Powers of patient advocate are suspended during any time the individual regains the ability to participate in medical treatment decisions.
- No process or form set forth in statute; opinion of one physician should be sufficient
- Current desire of resident to receive life-sustaining treatment overrides decision of patient advocate

# Mental Health Care

- An individual can grant authority for the patient advocate to make mental health decisions. An individual can give a patient advocate the power to authorize therapy, psychotropic medication and admission to a psychiatric in-patient unit of a hospital (without a civil commitment proceeding).
- An individual can be quite specific in indicating the type and dosage of medication that has been effective (or not effective); the hospital she or he wishes to be committed to, and the psychiatrist she or he wants to direct care
- If an individual wishes to give a patient advocate authority to make mental health decisions, the individual can State her or her wishes concerning mental health care in a durable power of attorney for health care, or sign a separate document, known as a “mental health advance directive,” a “psychiatric advance ,” or a “durable power of attorney for mental health care.”

# Mental Health Care

- There are similarities and substantial differences between health care and mental health care as they are addressed in advance directives.
- For more information, read Advance Directives for Mental Health Care, which has questions-and-answers and a model form.
- Drafting, translation and publication of the booklet were initiated by the late Irene Kaziecko, then head of community mental health at DCH.

# Living Will

- Concept of a living will is that an individual expresses his wishes concerning end of life treatment if she or he should become terminally ill and no longer able to participate in those decisions.
- Michigan is one of only three states that don't have a living will law.
- Individual can still sign a living will.
- A living will can be particularly useful for an individual who has no one to appoint as patient advocate.
- Extremely unlikely a nursing home will face liability for following an individual's wishes expressed in a living will.

# Do-Not-Resuscitate Order

- A do-not-resuscitate order that a resident signs is different from a do-not-resuscitate order a hospital puts in a patient's hospital chart.
- The Do-Not-Resuscitate Procedure Act was initially targeted at individuals such as hospice patients who wanted to die as peacefully as possible peacefully at home.
- Relatively recent the statute was amended so do-not-resuscitate orders are applicable to nursing residents.
- A DNR order is not limited in effect to individuals who are terminally ill.
- There are two standard forms. One is co-signed by a physician. The second is for individuals such as Christian Scientists who do not seek physician care.
- Concept: if breathing and heart stop, no resuscitation measures taken.
- Not limited in effect to individuals who are terminally ill.



# Do-Not-Resuscitate Order

- A nursing home cannot have a facility wide policy not to resuscitate all residents.
- A nursing home can request but not require a resident to declare her of his wishes concerning resuscitation.
- Who can sign –
  - Individual
  - Patient advocate with authority
  - Guardian with authority (but how can you tell if guardian has authority?)
- A DNR Order has no effect on whether an individual wants any other type of treatment.

# Do-Not-Resuscitate Order

- A guardian must talk with the attending physician and attempt to communicate with the resident before signing a DNR order.
- Whoever signs a DNR order - the resident, the patient advocate or the guardian - the resident always maintains the right to revoke it
- Nursing home staff should ensure residents who can communicate understand this right.

# Physician's Order for Scope of Treatment (POST)

- Legislation passed in 2017 but not yet effective.
- A POST document is the same concept as an advance directive, but
  - an individual cannot sign the document until she or he is terminally ill
  - the document is quite specific as to treatments the individual wants and doesn't want
- A POST document is applicable in a nursing home and in the community but not in a hospital.

# Physician's Order for Scope of Treatment

- A guardian must talk with the attending physician and attempt to communicate with the resident before signing a POST document.
- Whoever signs a POST document - the resident, the patient advocate or the guardian - the resident always maintains the right to revoke it
- Nursing home staff should ensure residents who can communicate understand this right.
- The Department will produce a standard form on a standard colored paper.

# Guardianship

- Guardianship has an enormous impact in loss of independence and dignity, despite the jejune comments of a probate judge.
- By repute, Michigan leads the nation in the number of adults who have a guardian.
- Guardianship should be used only as a last resort, when there are no alternatives.
- The law prohibits a nursing home from petitioning for residents as a matter of course, regardless of need.
- Nursing home staff should evaluate a resident's behavior in the context of her or his environment, experiences and sensory abilities.
- The results of a "mini-mental exam" are not dispositive.

# Guardianship Procedure

- An individual has substantial procedural protections in a guardianship proceeding, including -
  - Notice of the hearing; the right to be present at the hearing and to present evidence.
  - Explanation of the impact of guardianship and the right to contest the petition
  - Right to an appointed lawyer if the individual wishes to contest the petition
- In order to appoint a guardian, the court must find by clear and convincing evidence both that
  - The individual is unable to make informed decisions about her or his care
  - Guardianship is necessary to meet those needs
- Guardianship proceedings –
  - Differ significantly county-to-county;
  - Some judges do not follow the law
  - May include a hearing lasting only a few minutes

# Professional Guardians

- The law includes a strict priority who is to be appointed
  1. A person chosen by the individual at the time
  2. A person previously named as patient advocate or agent
  3. A family member suitable and willing to serve
  4. A professional guardian, as a last resort
- There are 300 completely unregulated professional guardians,
- Some are responsible for hundreds of individuals; Guardian, Inc. of Wayne County, for 600 individuals.
- There is woefully insufficient oversight of all guardians
- Despite a requirement in law, courts do not require guardians to file an annual, financial account.

# Powers and Duties

- Not all guardians have the same powers; a guardianship can be “full” or “limited.”
- Bias in statute is toward limited guardianship, though not all judges honor this.
- Staff must read the “Letters of Guardianship,” though even that may leave questions.
- A guardian’s responsibilities include –
  - Obtaining and authorizing medical care
  - Arranging for appropriate services
  - Advocating for rights of the resident
  - Visiting at least once every three months
  - Consulting with the individual before making major decisions
- For further information, consult Handbook for Guardians of Adults



# Visitors

- The law is silent on a guardian's authority to limit visitors; 14 states have passed legislation since 2016.
- Given a court must limit a guardianship to the demonstrated needs of the individual, there is strong argument a guardian cannot limit visitors without good cause.
- A guardian can petition the court for authority to bar a particular visitor.
- A petition would be granted were there adequate proof of a threat to the physical, financial or emotional well-being of the individual.

# Transition to the Community

- Nursing home staff must ask residents with a guardian whether the resident wishes to return to the community.
- Nursing home staff must refer residents who indicate such a wish for an evaluation of eligibility for the waiver program.
- Most guardians have authority to determine whether the individual lives.

# Remedies

- A resident can request the court to have a different guardian or to terminate the guardianship.
- The request can be made through petition or by letter to the judge; no one is allowed to interfere with transmission of the letter.
- A nursing home should contact the State Long Term Care Ombudsman Program to advocate for a resident who has issues with her or his guardian, e.g., guardian not allowing visitors.
- A nursing home can petition the probate court if a guardian is not performing any duties, e.g., not being available; not visiting; not arranging for needed medical care; not applying for Medicaid; misusing patient funds; not paying the bill.

# More Remedies

- If there are unresolved issues with a professional guardian or with a probate court, contact Milton L. Mack, Jr., State Court Administrator, Michigan Supreme Court.  
mackm@courts.mi.gov.
- If you have had continual issues, you may complete the Survey of Practices of Professional Guardians, in your materials, and e-mail the survey to Mr. Mack.